MICHAEL RODAK, JR

In The

Supreme Court of the United States

No. 74-55

GENE DAVID CLAY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR CERTIORARI

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To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

OPINIONS IN COURTS BELOW

There were no written opinions in the courts below.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is a final judgment by the Supreme Court of Virginia, entered on the 7th day of May, 1974, which confirmed a conviction of the petitioner for the Virginia felony of operating an automobile after having been declared an habitual offender,[1] which

[1] Sec. 46.1-387.8 of The Virginia Code, which defines the offense and sets a non-suspendable penitentiary penalty, is set forth in Appendix C (5). (This is found at back, which has pages numbered separately, at App. 34).

conviction was in the Circuit Court of Halifax County, Virginia, with final conviction order entered on September 13, 1973, pursuant to a trial held on September 11, 1973.

Petitioner seeks reversal of the aforesaid final judgment on the grounds that the Supreme Court of Virginia should have reversed the conviction of the petitioner because the petitioner's right against self-incrimination and right to counsel guaranteed by the Fifth and Sixth Amendments to the United States Constitution, including those set forth in *Miranda* v. *Arizona*, 384 U. S. 436 (1966),[2] were not protected at the trial to his prejudice. Because the grounds for this petition are based on federal constitutional rights specifically and duly set up and claimed by the petitioner in the courts below and re-asserted here, it is submitted that this Court has jurisdiction to review the final judgment of the Supreme Court of Virginia in this case by a writ of certiorari. For this invocation of jurisdiction, petitioner relies upon the statutory provisions of 28 U. S. C. Section 1257 (1964), which provides in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> By writ of certiorari
>
> * * *
>
> where any . . . right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

QUESTION PRESENTED

Whether, where the defendant did not testify, *Miranda* required exclusion from evidence of an admission in direct

[2] Hereinafter referred to as *Miranda*.

answer to in-custody interrogation with no *Miranda* warnings, while the petitioner was under arrest for operating a motor vehicle under the influence of alcohol, where the admission (of operating the vehicle) was the only evidence (and the sole admission) supplying an essential element of the Virginia felony of operation of a motor vehicle after having been declared an habitual offender?

CONSTITUTIONAL PROVISIONS

Petitioner relies upon the Fifth and Sixth Amendments to the United States Constitution which are set forth below in their entirety:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U. S. CONST. amend. V
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U. S. CONST. amend. VI.

STATEMENT OF THE CASE

(A)

Material Proceedings In The Lower Courts

The petitioner was tried in the Circuit Court of Halifax County, Virginia, on the 11th day of September, 1973, on a felony indictment of having, on April 25, 1972, operated a motor vehicle on the public highways of Virginia after having been declared an habitual offender in violation of Section 46.1-387.8 of the Virginia Code.[3] (R. 24-24)[4]

The federal question sought to be reviewed is whether the admissibility into evidence at the trial of an incriminating statement made by the petitioner while in police custody under arrest and in the absence of counsel, violated the petitioner's Fifth and/or Sixth Amendment rights, including those set forth in *Miranda*. This question was raised in the Courts below in the following manner:[5]

The petitioner pled not guilty, was tried by a jury, which convicted him and sentenced him to one year in the penitentiary. (R. 24-25)

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[3] Section 46.1-387.8 of the Virginia Code is set forth in its entirety in Appendix C (5). (App. 34)

[4] Reference to the Record are indicated by the letter R., followed by the appropriate page number, except that references to the Transcript of the trial on September 11, 1973, are indicated by the letter T., followed by the appropriate page of the Transcript. (The entire Transcript of the trial on September 11, 1973 was packaged together as an entirety by the Clerk's Office of the Circuit Court of Halifax County, Virginia as page 30A of the record. This treatment of the Transcript was left unchanged when the Record was made up by the Clerk of The Supreme Court of Virginia.)

[5] A brief summary of the manner in which the federal question was raised is set forth in this petition with reference to the portions of the record relied upon; these portions are set forth verbatim in Appendix A of this petition.

The sole incriminating statement by the petitioner was to the effect that he was operating the vehicle in question. (T. 22-25 & 36)[6]

Prior to the introduction of the incriminating statement into evidence, counsel for petitioner, during a conference in the chambers of the trial court, requested a hearing out of the presence of the jury to determine whether or not defendant's Fifth and Sixth Amendment rights were complied with, specifically citing those amendments, the Fourteenth Amendment, and *Miranda*. (T. 21) The Court granted this motion and ruled that the evidence of the circumstances surrounding the obtaining of the incriminating statement would be heard by the court in the absence of the jury (T. 21). To that end, the arresting officer, State Trooper C. L. Jackson, testified out of the presence of the jury. (T. 22-27). At the conclusion of this testimony, the Court immediately stated that *Miranda* did not apply and stated, "Take your exception to that". (T. 27) Thereupon, defense counsel argued that the officer's testimony was not sufficient to make the incriminating statement admissible, (T. 27-28) and stated, "However, if the Court rules otherwise, then I will take exception to it". (T. 28) Defense counsel then indicated that the defense wanted to put on evidence that the defendant was not in a condition at the time of the incriminating statement to have intelligently understood and waived his rights. (T. 28)

The Court then stated again that *Miranda* did not apply, and said "If the jury believes that he was irresponsible and didn't know what he was talking about, then that is a matter for the jury to believe." After again reiterating that

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[6] References to that part of the Record contained in the Transcript of the trial on September 11, 1973, are indicated by the letter T., followed by the appropriate page number of the Transcript.

the court did not consider *Miranda* applicable, the Court stated, "You can take exception to it". (T. 28-29)

Thereupon, defense counsel again asked to be allowed to introduce the psychiatrist's testimony on the question of the admissibility of the incriminating statement. (T. 29-30) The Court would not allow the testimony of the psychiatrist on that issue, stating that the psychiatrist's testimony was a matter for the jury, inasmuch as the Court had ruled that *Miranda* was inapplicable. (T. 29-31)

Defense counsel vouched into the record what the psychiatrist's testimony would be if he were allowed to testify on the admissibility of the confession. (T. 30)

Defense counsel excepted to the admission of the incriminating statement into evidence on grounds that the allowance of this statement before the jury violated the defendant's Fifth and Sixth Amendment rights, specifically citing *Miranda*, and defense counsel excepted to the refusal to allow the psychiatrist to testify in the absence of the jury. (T. 31) Thereupon, the case resumed in the presence of the jury (T. 31) at which time the Commonwealth's Attorney asked the arresting officer to tell the jury what rights he had advised the petitioner of, at which time the defense counsel objected again to the admission into evidence of anything the defendant may have said, which was noted by the court. (T. 31-32)

The arresting officer then testified as to the facts surrounding the incriminating statement and the incriminating statement itself. (T. 32-38)

The foregoing testimony by the arresting officer of the petitioner's admission was the only testimony tending to show that the petitioner was operating the vehicle. (T. 3-6!)

At the conclusion of the Commonwealth's evidence, defense counsel moved the Court to strike the Common-

wealth's evidence on the grounds that there was no competent evidence that the defendant was driving the vehicle, and that the officer's testimony concerning the defendant's statement should not have been admissible because it was not shown that defendant had been properly advised of his rights and that he understood them. (T. 62-63) The Court stated, "I'm going to overrule your motion and you may state your exceptions to it", to which defense counsel stated, "Counsel notes its exception on the grounds previously stated and also includes the amendments applicable to the *Miranda* v. *Arizona* case." (T. 63)

All of the defense evidence related to the defense of temporary insanity. (T. 63-91) The defense presented no evidence on the issue of whether the defendant was operating the vehicle and the defendant did not testify. (T. 63-91)

At the conclusion of all the evidence, the defendant moved again that the Court strike the Commonwealth's evidence and dismiss the charge against the defendant and render a verdict of not guilty on grounds including that the incriminating statement by the defendant was inadmissible, "by reason of the Fifth and Sixth Amendments to the U. S. Constitution as applied to the State by the Fourteenth Amendment as set forth in *Miranda* v. *Arizona* . . ." (T. 92-93)

The Court overruled the defense motion to which defense counsel excepted. (T. 94)

Defense counsel objected to all finding instructions on grounds that there was not competent evidence that the defendant was operating the automobile in question. (T. 94)

After the jury found the defendant guilty and sentenced him to one year in the penitentiary, defense counsel moved

to set the verdict aside and enter a verdict for the defendant on grounds including that the defendant's incriminating statement, which was the only evidence that he was driving the automobile, was made in violation of Fifth and Sixth Amendment rights as applied to the States by the Fourteenth Amendment and as set forth in *Miranda*. (T. 105-106) This motion also included the grounds that the Court should have struck the evidence at the end of the Commonwealth's evidence, should have entered a verdict for the defendant at the end of all of the evidence and should not have granted any of the instructions for the prosecution. (T. 106)

The Court overruled the motion to set aside the verdict. (T. 106)

The trial court suspended execution of sentence on suggestion that the defendant intended to appeal. (R. 24-25) and on September 14, 1973, the defendant filed notice of appeal and assignments of error setting forth that the admission of the incriminating statement into evidence, violated the defendant's Fifth and Sixth Amendment rights. (R. 27-28) The defendant also assigned as error the Court's refusal to allow the defense in chambers to put on evidence that at the time that the defendant made the incriminating statement he was unable to intelligently waive his rights. (R. 27-28)

The defendant also assigned as error the Court's refusal to strike the Commonwealth's evidence at the end of the case in chief and at the end of all of the evidence, the Court's granting of any prosecution instructions, and the refusal to set aside the verdict of the jury on grounds that there was not competent evidence that the defendant was operating the automobile in question. (R. 27-28)

On January 10, 1974, defendant filed his petition for

appeal. The grounds stated in the petition for appeal for reversal of the final judgment of conviction were based solely on the contention that the petitioner's Fifth and Sixth Amendment Constitutional rights had been violated by admission of the incriminating statement into evidence, this being the sole evidence *proving that the defendant was* operating the automobile.

On May 7, 1974, The Supreme Court of Virginia denied the petition for writ of error and confirmed the decision of the lower court, the effect of which under the provisions of Section 8-476 of the Virginia Code[2] was a final judgment upholding the conviction of the petitioner. (R. 32)

(B)

Statement Of Material Facts

There is little dispute as to the facts. The only possible shadings of differences as to testimony would be as to the defendant's mental and emotional condition at the time of the self-incriminating statement. As to all other facts, there is no dispute, and all of those facts are based upon the testimony of police officers. The police acknowledged that no *Miranda* warnings were given before the interrogation which obtained the incriminating statement.

(1)

CIRCUMSTANCES OF ARREST AND INTERROGATION

E. W. Ford, Deputy Sheriff of Halifax County, testified that he was called to the scene of an automobile accident in Halifax County, Virginia, from 1:45 to 2:00 P.M. on April 25, 1972. (T. 4-5) He testified that on his arrival at the scene he saw a man going down a pipeline about two

[2] Sec. 8-476 of The Virginia Code is set forth in its entirety in Appendix C (1). (App. 25)

or three hundred yards ahead, on foot, at a fast walk in front of some police officers. (T. 506) He testified that he got out of his police car (T. 7) and attempted to circle behind the defendant. (T. 8) As he approached the crest of a hill he saw the defendant lying on the ground with a pistol in his hand, looking down the gun barrel, waving the pistol back and forth. (T. 8-9)

Deputy Ford testified that the defendant was aiming his gun in the direction of several police officers. (T. 9)

Deptuy Ford was armed with a sawed-off shotgun. (T. 7) He told the defendant three times to put down his gun and the third time said that if the defendant did not put down the gun he would "blow your brains out". (T. 10-11)

Deputy Ford testified that the defendant then released his gun and rose up to sit on his haunches with his hands on his hips. (T. 11-12) He testified that the defendant remained sitting back on his haunches until Virginia State Trooper C. L. Jackson arrested him. (T. 13)

Deputy Ford testified that the defendant had a strong odor of alcohol about him and that his eyes were very red. (T. 14) A blood alcohol test showed that the defendant had .22 percent blood alcohol in his blood. (T. 41-42)

Deputy Ford testified that the defendant was taken from the scene of the accident in Deputy Ford's car (T. 13-14) and was taken to a hospital to have blood taken to determine the alcohol quantity of his blood. (T. 15)

Deputy Ford testified that the defendant was given the opportunity to take the blood test or refuse to take the blood test and that he consented. (T. 15-16)

Deputy Ford testified that he rode in the car with the defendant and Trooper Jackson from the scene to the hospital and from the hospital to the jail, and that, "Trooper Jackson asked the defendant a question and then the de-

fendant, then he would answer the question". (T. 17-18) Deputy Ford did not testify as to the substance of the questions and answers or as to question of *Miranda* warnings. Deputy Ford did not give any testimony regarding the scene of the wreck as to the automobile, its location, its proximity from the defendant, etc.

Trooper Jackson testified that he received a call regarding an accident at approximately 1:15 P.M. and that when he arrived at the scene of the accident he found a 1970 green Ford down an embankment. (T. 32) He testified that a short time after he arrived at the scene he went to a pipe line about .2 of a mile west of the scene of the accident where he observed a white man later identified as the defendant. (T. 33) He corroborated Deputy Ford's testimony as to the arrest of the defendant and stated that when the defendant released his gun, he, Trooper Jackson, walked up to the defendant and picked up the gun. (T. 33-34)

Trooper Jackson testified that at the time the defendant "had a real sheepish type grin on his face". He testified that the hammer was back on the gun which had fired all but one live round. (T. 34-35)

Trooper Jackson testified, "I got the gun and then handcuffed him". (T. 35)

The defendant was taken to Deputy Ford's car and placed in the car from which Deputy Ford drove the defendant back to the highway, and Trooper Jackson got in the back seat of the car with the defendant. (T. 36)

The trooper testified that he considered the man under arrest for driving under the influence of alcohol. (T. 22)[8]

[8] The applicable Virginia statutes are Sec. 18.1-54 of the Virginia Code, which provides that it shall be unlawful to operate a motor vehicle in Virginia under the influence of alcohol, and Sec. 18.1-58, which sets the penalty. Both statutes are set forth in Appendix C (2, 4). App. 25 et seq. 33)

He testified that ten or fifteen minutes had elapsed from the time he had placed the defendant under arrest until the time that he got into the back seat of the car with the defendant. (T. 26)

Trooper Jackson testified that the defendant was not free to go at that time, that he was in police custody and under arrest. (T. 26-27)

The trooper testified that after the defendant had been brought back to the road and he had gotten into the car he questioned the defendant. (T. 26)

The trooper acknowledged that he did not advise the defendant of any of the *Miranda* warnings before this questioning. (T. 27)

The trooper testified that in response to his questions, the defendant gave his name, and that the trooper determined that the defendant did not have a driver's license. (T. 36) The trooper testified that he questioned the defendant about the circumstances of the accident—"I asked him what had happened." And that the defendant said "something to the effect that he didn't know what had happened. It just got off the road and got away from him." (T. 22-23) At another point the trooper testified "I also questioned him about the accident and he stated that the car, the car just got away from him." (T. 36)

The trooper testified that he advised the defendant of Virginia's implied consent law[7] and the defendant agreed to the blood test. (T. 23) The defendant was taken to a hospital where the blood test was taken and then brought back to the Halifax County Jail. (T. 23)

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[7] The applicable Virginia Implied Consent Law in effect on April 25, 1972, was Section 18.1-55.1 of the Virginia Code (Code 1950 (Suppl.), Sections 18-75.1, 18-75.2; 1954, c. 406; 1956, c. 557; 1956, Ex. Sess., c. 45; 1960, cc. 358, 547; 1962, c. 625; 1964, c. 240; 1966, c. 635; 1970, c. 622.), which is set forth in its entirety in Appendix C (J.A. App. 25).

In the meantime a check had been made with the Virginia Division of Motor Vehicles, (T. 22) and at the conclusion of that, after the defendant was brought to the jail, the defendant had been reminded that he had been an habitual offender under Virginia law. (T. 23) Subsequently, the defendant was advised of his *Miranda* rights. (T. 23-24); subsequent to these warnings, the trooper did not remember the defendant having made any statement whatever. (T. 24)

Aside from the previously described statement made in the officer's car in response to interrogation with no *Miranda* warnings ten or fifteen minutes after the arrest, the defendant made no further reference to who was driving the car. (T. 24-25)

Deputy Ford and Trooper Jackson were the only police who testified.

(2)

PSYCHIATRIC TESTIMONY OF PETITIONER'S CONDITION

Defense counsel vouched into the record what a psychiatrist would testify if he were allowed to do so in the hearing in chambers on the question of the admissibility of the incriminating statement, as follows:

> "(T)he psychiatrist would testify that the defendant, at the time that he was arrested, that he was sick.
>
> * * *
>
> Further, he would testify that (the defendant) didn't know right from wrong and therefore could not have known his rights. He couldn't have intelligently waived his rights and therefore, he could not have known that he had any rights to remain silent at the time that he made this statement.
>
> The psychiatrist would also testify that he is a very sick man."
>
> —T. 30

The Court stated that if the psychiatsist's testimony showed that the defendant "did not know what he was doing by virtue of insulin shock or some other kind of problem, then in this case the jury will have to decide that. (T. 30-31)

After the admission of the incriminating statement into evidence, the Commonwealth called a state psychiatrist who testified that he examined the defendant from March 2 to March 9 of 1973 and that he did not find the defendant to be emotionally disturbed in any way. (T. 46-47) Nevertheless, the State psychiatrist testified regarding the time of the alleged offense, "I think the possibility of him having reactions to his insulin at that particular time are quite real". (T. 53)

At the conclusion of the Commonwealth evidence, the defense called James Asa Shield, Jr., M.D. a private psychiatrist, who testified that he examined the defendant at Tucker Hospital at Richmond, Virginia, from December 11 to December 14, 1972. (T. 72) He testified that he took a variety of tests and that the defendant received a psychological test, a physical examination, laboratory study, and his social history was taken. (T. 73)

Dr. Shield testified that the defendant had an intelligent quotient of 78, "on the border between what is normal and what is mental retardation."

Dr. Shield testified that the defendant did not have "a psychiatric diagnosis as such." (T. 73)

Dr. Shield testified that the defendant had a severe diabetic history (T. 76) and that in his opinion at the time of the alleged offense the defendant did not know right from wrong. (T. 75) He testified that defendant's diabetic difficulties and insulin reaction was very important to this opinion. (T. 76)

Dr. Shield testified that even under controlled conditions at Tucker Hospital the defendant's diabetes was not always well controlled. (T. 79-80)

Dr. Shield testified that the defendant's intake of alcohol probably complicated the insulin reaction at the time of the alleged offense. (T. 82-83)

Dr. Shield's testimony was summed up as follows:

> The Court: Can you testify with reasonable medical certainty whether this man was suffering from insulin shock or a heavy intoxication, or a combination of both?
>
> Witness Shield: I feel that I can state that he has a serious diabetic condition. Also that he is unstable and that a man as unstable as this who has a history and a background approaching what he does and also the intelligence or intellectual endowment that he has, coupled with the fact that he had been drinking and that he was sick earlier in the day, it is my opinion and my best judgment, that he was of an unsound mind as a result of all of these three things put together. (T. 85)

ARGUMENT

Admission Of The Incriminating Statement Into Evidence In The Felony Trial Stripped Petitioner Of His Fifth And Sixth Amendment Rights Because He Received No Prior Miranda Warnings And Was In No Condition To Have Independently Understood His Rights.

The rulings of the State courts in this case in effect set aside *Miranda* in Virginia, even though *Miranda* has not been overruled by the United States Supreme Court.

If *Miranda* is to be overruled or confined to limits not presently understood, then it should be done only by The United States Supreme Court, so that there will be uni-

formity in the law, and so that both sides of a criminal trial will know the parameters of *Miranda.*

If The United States Supreme Court had overruled *Miranda* or clearly limited it to allow admission of an incriminating statement under the circumstances of this case, then the trial tactics of the defense in such a case might change considerably.

In such a case, the petitioner might have taken the stand to advance his defense of temporary insanity or incompetency because of insulin shock.

Under a reasonable reading of what would appear to be present Fifth and Sixth Amendment procedural safeguards, the petitioner was placed in a dilemma. If he concluded that the trial court had deprived him of Fifth and Sixth Amendment procedural safeguards as set forth in *Miranda,* in order to continue to assert *Miranda* rights, the petitioner needed to refrain from testifying. Otherwise, he might waive his procedural safeguards as set forth in *Miranda,* because the prosecution could have introduced the incriminating statement in cross-examination of the petitioner.

The rulings of the lower courts in this case leave unsettled the effect of *Miranda* in Virginia. If present constitutional law provides that an incriminating statement obtained under the circumstances of this case can be admitted into evidence to supply the essential element of a criminal charge, then Virginians facing trials placing them in jeopardy of penitentiary sentences, and their counsel, should be put on notice *Miranda* is thus limited.

It is submitted that *Miranda,* which has not been overruled, precluded admission of the petitioner's incriminating statement into evidence. No accepted exception to *Miranda* applied to this case.

The defendant was in custody. The police had arrested him, handcuffed him and taken him to a police car where

the police testified that he was not free to go. In such police custody he was interrogated without any *Miranda* warnings. His incriminating statement was not volunteered, but was in direct and natural response to a police question as to how the accident occurred.

When asked to explain the accident, the petitioner answered that the car got away from him, an admission that he was operating the car, which admission supplied a crucial element of the prosecution's case in his felony trial. This proof was apparently not available through any other prosecution evidence; at least the prosecution presented no other evidence to prove that he was operating the automobile.

As soon as the petitioner was advised of *Miranda* rights he made no statement.

The jury rejected the petitioner's defense of temporary insanity; the complicating factor of alcoholic intoxication mitigated against that defense. However, the combination of insulin reaction, low intelligence and intoxication rendered the petitioner's physical and mental condition such that he hardly could have had an independent understanding of his right to counsel and of his right to place the burden of incrimination upon the Commonwealth.

The police knew that they had arrested the petitioner on a misdemeanor charge which might result in a jail term.[10] He had been arrested at gun point. Under such circumstances there was no reason for the police to delay giving *Miranda* warnings until after they established that the petitioner was operating the vehicle.

Because of the petitioner's condition, there is serious question whether this confession would have been admissible

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[10] Sec. 18.1-58 of The Virginia Code provides for a maximum jail term of six months for a a first offense driving under the influence. (See App. 33)

under pre-Miranda law. Certainly, if *Miranda* is still alive, the trial court should have excluded the incriminating statement from evidence, in which case the prosecution would have fallen.

CONCLUSION

It is submitted that the admission of the petitioner's incriminating statement into evidence violated the petitioner's Fifth and Sixth Amendment rights to his prejudice, and left unsettled the application of these rights in Virginia.

Wherefore, petitioner prays that this Court grant a writ of certiorari, reverse the final order of The Supreme Court of Virginia affirming the petitioner's conviction and either order that the charges be dismissed against the petitioner or remand for a new trial.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

GENE DAVID CLAY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Appendix A to Petition for Certiorari, Containing Portions of The Record Showing Fifth and Sixth Amendment Federal Questions Were Properly Raised in the Lower Courts

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(This appendix is presented pursuant to Rule 23 of The Rules of The Supreme Court of the United States.)

In the Circuit Court of Halifax County, prior to the admission of the confession into evidence in this case, the following motion was made in Chambers by counsel for the petitioner:[1]

[TR. PP. 21-31][2]

"The Court: All right. Mr. McLaughlin, what is the motion that you would like for the Court to hear?

Mr. McLaughlin, III: I would like to have a hearing before the Court, before any statements are made by the witness, to determine whether or not the defendant's rights as granted by the Fifth and Sixth Amendment to the U. S.

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[1] The short notes explaining the context of the portions of the record contained in this appendix are set out in italics.

[2] References to the transcript are designated by "TR." followed by the appropriate page number.

Constitution, as applied to the Fourteenth Amendment and as set in the *Miranda* v. *Arizona* case.

Mr. Bledsoe: I would like to check that point out definitely with the witness.

The Court: Then you want to have the hearing on this before the Court?

Mr. McLaughlin, III: Yes.

The Court: Bring in Trooper Jackson.

Note: Witness Jackson was called in to chambers.

The Court: Go ahead, Mr. Commonwealth Attorney.

By Mr. Bledsoe:

Q Officer Jackson, before this interrogation of this defendant took place, did you give him the Miranda warning? A He was arrested at the scene for driving under the influence of alcohol. When we got him back to the road I questioned him then. I did that to determine if he had operated the car without an operator's license and also to find out just who he was, and so forth. He did not have an operator's license on him. So I ran a check with the Richmond, with the Division of Motor Vehicles. It was determined that it was revoked, the driver's license that is. And in talking with him—

Mr. McLaughlin, III: I'm going to object. He has not gotten to the point of warning him yet.

Witness Jackson: I'm leading up to it.

The Court: All right, we're here now to find out. Go ahead, Trooper.

Witness Jackson: In talking with him at that time, I asked him what had happened, that was from the stand-

point of the investigation of the accident. He said something to the effect that he didn't know what had happened. He just ran off the road and it got away from him. But he was advised of the blood test law and so forth.

Then he agreed to the blood test and he was taken to the hospital after that. When we went to the hospital, that's where the blood tests were ran and then we brought him back to the County Jail and his wife was there. His wife was at the jail and she had been talking with Sergeant Hollinsworth and at that time he was advised that he had been declared a habitual offender. So he was advised of his rights then.

The Court: What rights did you advise him of?

Witness Jackson: His rights to have an attorney And, of course, anything that he said might—could be used against him and so forth.

The Court: Don't say and so forth. What rights did you advise him of?

Witness Jackson: I have a little Miranda warning card that was read to him. Based on—

Mr. Bledsoe: Well, let me continue with the questions.

By Mr. Bledsoe:

Q Do you have this card with you?

The Court: Do you know what the rights are without the card?

Witness Jackson: Of course. He has the right to have an attorney present and that anything that he would say could and can be used against him in a court of law.

The Court: Did you advise him if he didn't have funds to employ counsel, that the State would provide him with

counsel? That the State would provide him with an attorney? Did you advise him of that?

Witness Jackson: I don't recall. I believe that is one that is on that card.

The Court: Yes.

Witness Jackson: It it's on there, then he was advised of it.

The Court: After you were through advising him of his rights, what did he say?

Witness Jackson: Well, he was fingerprinted when it was realized that it was a felony charge. I talked to him then in the Sheriff's office, but he, I don't recall him saying anything about the accident then, that he was driving, or anything.

The Court: What you're saying, your testimony is, or it will be, is that at the scene that he told you that he was driving the car. He was driving the car and it got away? Is that what your testimony will be?

Witness Jackson: Yes.

The Court: Subsequent to that no further reference was made to who was driving the car, was it?

Witness Jackson: No.

The Court: Then it was just assumed that he was driving after that?

Witness Jackson: Yes.

The Court: Then at that time, at the time that you arrested him, you arrested him on a charge of drunk driving?

Witness Jackson: Yes.

The Court: In making your investigation, did he make an explanation to you, that the car ran off the road?

Witness Jackson: Yes.

The Court: All right.
Do you want to examine him, Mr. McLaughlin?

Mr. McLaughlin: Yes, sir.

Cross-Examination

By Mr. McLaughlin, III:

Q Officer, when you say that he said the car ran off the road, or that it got away from him, where was he at that time? A He was sitting in the back of the Deputy Sheriff's car.

Q He was not at the scene at that time? A Well, where the accident happened and where the pipe line crosses the road, it's about 2/10 of a mile west. We had brought him back to that location where the pipe line crosses the road.

Q How long? How much time had elapsed when you first put him under arrest before you had this conversation? A Just a short while. The ten or fifteen minutes, that was the time it took to bring him back up to the road.

Q You brought him up to the road and after about, say, ten minutes, you put him in the car? A Well, he was put in the car—he was put in the car and brought back to the road. And, the best I recall, the rest of us walked back to the road and as soon as we got to the road he was questioned.

Q He was not free to go at that time? A No, sir.

Q At that time, was he under or in your custody? A That's right.

Q In the Deputy's car? A Yes.

Q Had you put him under arrest at that time? A Yes.

Q You didn't advise him of the Miranda warning before he made this statement? A No, sir.

Q Well, that's all.

The Court: The Court simply noted that the statement made to the officers in cases or on occasions where a man is arrested and held for drunk driving, as to who he is and to what he was doing and those things, is nothing but an admission against interests and doesn't complicate the rule of Miranda.

Take your exception to that.

Mr. McLaughlin, III: What we have here is a felony case and a question of whether or not the Commonwealth may introduce evidence on a confession by the defendant that he was driving the car. This being the only evidence that the Commonwealth intends to present on this essential element of the case. It is my understang (sic) that we are entitled to present evidence before the Court and before a hearing before the Court, on this matter.

Now, I would submit at the outset that the Officer's testimony does, it is not sufficient to show that sufficient warning was given.

However, if the Court rules otherwise, then I will take exception to it. Then I would like to put on evidence that the defendant was not in a condition at that time, to have intelligently understood and waived his rights at the time that he made this statement. We have a psychiatrist here to so testify.

The Court: I am not holding that this is a confession. I am holding simply, that it was a statement made to the officer when he was arrested for drunk driving. If the jury believes that he was irresponsible and didn't know what he was talking about, then that is a matter for the jury to believe.

I am not putting this under *Miranda.* In other words, the only evidence they have to prove the essential elements, is this man's statement. *Miranda* holds that any statement made by or while in custody is inadmissible unless it is proven.

Now, where you called it a confession, it is an in custody statement which is used to prove every essential element of the crime. I don't think this kind of a statement about the accident, at the scene, especially when the officer was trying to find out what the man was doing, I don't think that comes within the Miranda. You can take exception to it.

Mr. McLaughlin, III: Will the Court allow us to put on the psychiatrist? We can put him on and he will testify that he couldn't have intelligently understood this. The psychiatrist will testtify that the *Miranda* couldn't be complied with.

The Court: I am holding that *Miranda,* has nothing to do with this case.

Mr. McLaughlin, Jr.: I would like to call the psychiatrist, I would like to have his testimony in this case.

The Court: You're going to use the psychiatrist in this case anyhow. If you prove this man didn't know what he was doing, then he's vindicated.

Mr. McLaughlin, III: We feel that is a separate issue. We feel that at that time, at the time that this point was

submitted, that the Commonwealth has no case against this man. The Commonwealth can't prove by valid evidence that this man was driving the car. The only evidence is his own statement made without warning.

The Court: I have ruled on that.

Mr. McLaughlin, Jr.: Well, can we put into the record that he would say? Then, can I put into the record what the psychiatrist would say if the psychiatrist were alllowed to testify at this hearing? I know the psychiatrist would testify that the defendant, at the time that he was arrested, that he was sick. I know the psychiatrist would testify to that.

Further, he would testify that my client didn't know right from wrong and therefore, could not have known his rights. He couldn't have intelligently waived his rights and therefore, he could not have known that he had any rights to remain silent at the time that he made this statement.

The psychiatrist would also testify that he is a sick man. That he takes—

The Court: The Court will rule that he is the defendant in this matter and if it is shown that he was by the psychiatrist, that he did not know what he was doing by virtue of insulin shock or some other kind of problem, then in this case the jury will have to decide that. That is my ruling and you may take your exception to it.

Mr. McLaughlin, III: We would like to note our exception to the Court's ruling in this case. It is our feeling that this man's statement that he was driving the car was incorrectly admitted on the grounds that it violates his rights under the Fifth and Sixth Amendment as applied to the Fourteenth Amendment as set forth in *Miranda* v. *Arizona*."

Note: At this point Court, counsel, defendant and witness returned to the courtroom, whereupon the proceedings continue in open court, viz:

The defendant repeated objections to the admission of the defendant's statement, which was overruled by the Court and the officer testified as to the statement. These matters are set forth as follows:

[TR. PP. 31-38]

"The Court: Let's proceed, gentlemen.

Direct Examination (Cont'd)

By Mr. Bledsoe:

Q Just go ahead and tell the jury what rights you advised him of. Just go ahead from the beginning.

Mr. McLaughlin, III: I'm going to object for the record. I would like to restate our objection at this time. I'm objecting to anything that the defendant may have said.

The Court: All right, sir.

Witness Jackson. On April 25, 1972, at approximately 1:15 p.m. I received a call to investigate an accident on Route 360. That location was west of Halifax, Virginia.

When I got to the scene of the accident I found it to be located three and four tenths miles west of Halifax on Route 360. When I arrived at the scene of the accident I found a 1970 green Ford at that location. The vehicle had gone out of control and had gone down the embankment. I received information at the scene that a white male had ran from the car. He had a cut on his left arm. He also had fired several shots from the gun as he went into the woods—

Mr. McLaughlin, III: I would like to object at this

time, Your Honor. I just want to preserve my record. We would like to ask that any testimony of what he was told about having run from the car, that that testimony be disregarded.

The Court: Lady and gentlemen of the jury, the report that the officer received, the truth or falsity if that information, that is not an issue before you. You cannot consider it. Only consider the fact that a report was made to him. Do you understand what I mean? The personnel that made that report are not testifying. They're the only ones that can testify about that report. This witness is testifying as to what he saw. The officer is only telling you that he did receive a report and that's all.

You can continue, Trooper.

Witness Jackson: A short time after I arrived there at the scene, I had gone to a pipe line that was located about two tenths of a mile west of the scene of the accident itself. At that location I observed a white male come out onto the pipe line. That was approximately one half mile from the hard surface road.

Several deputies and I were there and we proceeded down the pipe line to ascertain if this was the individual that had been in the accident. As we were going down the pipe line, we observed a subject going up onto a hill and going out of sight. As we came up on the hill I was slightly ahead of the other deputies.

When I got up to where I could see over the crest of the hill I observed, or I saw the defendant at that time. I saw the defendant lying in the grass on his stomach looking toward us. While he was looking toward us, at that time, he had a pistol in his hand. I told him to put the gun down and when I did he got the gun up in his hand and pointed

it right at me. At that time we all hit the ground and got out of sight.

One of the officers, he circled around the lower side of the hill. Then a couple of minutes or a few minutes later, I saw Deputy Ford on the upper side of the hill. I saw that he had a shotgun with him at that time. Also at that time I heard him tell the defendant to put the gun down. At that time I could see the defendant from behind the crest where I was standing. He did not put the gun down and then about, I believe, Ford told him about three times to put the gun down before he finally laid the gun down. When he finally did lay the gun down he sat back on his haunches and put his hands on his hips. Then I walked up to him to pick up the gun. At that time he had a real sheepish type grin on his face. I went ahead and picked the gun up and the hammer was still back on--

By Mr. Bledsoe:

Q Did I understand you to say that the hammer was still back? A Yes.

Q Was the gun loaded at that time? A There was one live round in it and the rest of them had been fired. I got the gun and then handcuffed him.

From my observations I felt that he was being--well, that he was the subject that was driving the car and that he had been drinking.

Q May I ask you one question at this time. Did you find any scratch marks or any wounds on either arm? A Yes, he had a cut on his left arm.

Q Was this man--

Mr. McLaughlin, III: I'm going to object at this time. I'm objecting because I still want to make the record. I'd

like to ask the Court to have the jury disregard his last statement, that from his observations that he assumed that he was driving the car.

The Court: I might say this to the jury and I know I have explained it many times before. But, it is very difficult to have a witness to testify and many times they interject their own opinions. I would ask you to disregard any opinions that have been related to you. This, of course, has to be the jury's decision and not the witness'. Whenever they do express an opinion which might be often and very inadvertently, then I would ask the jury to simply ignore it. I might tell the jury that individually each one of you should make up your own mind based on the facts as related to you.

By Mr. Bledsoe:

Q Was this a white man? A Yes.

Q It was a white man that you apprehended? A Yes.

Q Could you tell whether it was the same individual that you had formerly seen from this? A It appeared to be, yes, sir.

Q Will you continue on? A The man was taken to Deputy Ford's car and placed in the car. Deputy Ford then brought him back to the highway in his car, to our deputy and I walked back to the road. When I arrived there I got in the back seat of the car with the defendant. At that time I asked him who he was and he told me that he was Gene David Clay. I asked him about his driver's license at that time. He didn't have one.

I also questioned him about the accident and he stated that the car got, the car just got away from him. I ad-

vised him that he would be charged with driving under the influence. I also explained to him about the blood test law. I advised him of that. After I advised him of that, he said that he would take the blood test.

At that time, he was taken out of Deputy Ford's car and put into my car. He and I and Deputy Ford, proceeded to the Halifax Community Hospital to get the blood test. On the way to the hospital I ran a record check with the Richmond Motor Vehicles. That's the Division of Motor Vehilces at DMV. And—

Mr. McLaughlin, III: I'm going to object at this time because the record checks are not admissible.

The Court: Do you have that record, Mr. Commonwealth's Attorney?

Mr. Bledsoe: Yes, sir.

The Court: Can you connect it up?

Mr. Bledsoe: Yes, sir.

The Court: Go ahead, Trooper.

Witness Jackson: I received a reply back and it said that Gene David Clay, that his operator's license had been revoked in the State of Virginia.

He was taken to the Community Hospital and the blood test was drawn on him. When we got back to the Sheriff's office with him, he was advised there by Sergeant Hollinsworth, that the man's wife had—that he had received information that the man was driving after having been declared an habitual offender—

Mr. McLaughlin, III: I'm going to object, because that is not admissible.

The Court: Certainly hearsay is not admissible. I am assuming that the Commonwealth's Attorney will connect it up.

Mr. Bledsoe: Yes, sir.

The Court: If you don't, I will advise the jury.

By Mr. Bledsoe:

Q Go ahead, Trooper. A At that time the defendant was advised of his rights under the *Miranda* warning and was processed and turned over to the Sheriff's Department. He was also incarcerated at that time."

At the conclusion of the Commonwealth evidence, defense counsel moved to strike the Commonwealth evidence. Relative portion of that motion is set forth as follows:

[TR. PP. 62-63]

"Mr. McLaughlin, III: The defendant moves the Court to strike the Commonwealth's evidence on the following grounds.

* * * *

There is no competent evidence to show that the defendant was driving the car for two reasons. The first reason, is the police officer's testimony. His testimony about the statement made by the defendant. The only statement that the police officer gave about the defendant was what the defendant supposedly stated in answer to a question. The statement that the car got out of his control and it left the highway. This is not sufficient in and of itself to prove that he was driving the car.

The second reason is that the officer's testimony, concerning the defendant's statement, that it is not admissible because it has not been shown that the defendant was properly advised of his rights, and that he understood them.

Therefore, it's not admissible evidence in the case. There is no evidence that the defendant was operating the vehicle at that time. That is an essential element.

The Court: I'm going to overrule your motion and you may state your exceptions to it.

Mr. McLaughlin, III: Counsel notes its exception on the grounds previously stated and also includes the amendments applicable to the *Miranda* v. *Arizona* case."

At the conclusion of all of the evidence defense counsel moved the Court to strike the evidence and dismiss the charges against the defendant. Defendant also excepted to all instructions which were based upon any evidence defendant was driving the vehicle in question. Portions of that motion and exception are set forth as follows:

[TR. PP. 92-94]

"The Court: Do you want to make a motion, Mr. McLaughlin?

Mr. McLaughlin, III: Yes, sir. At the conclusion of the evidence the defendant by counsel moves the Court to strike the evidence and dismiss the charges against the defendant and render a verdict of not guilty. On the grounds that it has not been shown by competent evidence that the defendant was, in fact, operating a motor vehicle on the day of the alleged offense. The only evidence purporting to show that he was operating an automobile, from which it might be argued that there was competent evidence, that he was operating a motor vehicle, was the testimony of the officer, that the defendant made a statement while he was in custody and when he had not been advised of his rights, under the *Miranda* v. *Arizona* case.

Secondly, during this time, he was not in a condition to

voluntarily waive his rights even if he had been so advised. This has been the only evidence that he was operating an automobile. This is inadmissible by reason of the Fifth and Sixth Amendments to the U. S. Constitution as applied to the State by the Fourteenth Amendment as set forth in *Miranda* v. *Arizona*, therefore it should be, the charges should be dismissed.

The Court: The Court is going to overrule your motion.

Mr. McLaughlin, III: Note my exception to the Court's ruling.

The Court: All right. I'm going to grant Instructions 1, Instruction 2 and Instruction 3 for the Commonwealth.

I'm going to grant Defense Instructions A, Instruction B and Instruction C.

You may go ahead and state for the record any objections that you might have.

Mr. McLaughlin, III: We will object to the instructions because the Commonwealth has not proven its case.

The Court: All right, sir. You may make your objections.

Mr. McLaughlin, III: The defendant by counsel objects to the granting of Instruction No. 1 on the grounds that there is no competent evidence to support it. Therefore counsel objects and excepts to the Court's ruling. There is no competent evidence to support Instruction No. 1. There is no competent evidence that the defendant was operating the automobile at the time and place in question."

The jury found the defendant guilty and sentenced him to one year in the penitentiary. As soon as the jury was dismissed defendant moved to set aside the verdict of the jury, enter a verdict for the defendant, which motion the

Court overruled. A portion of the motion by defense counsel and the entirety of the Court's ruling on that motion are set forth as follows:

[TR. PP. 105-106]

"The Court: Are there any motions, gentlemen?

Mr. McLaughlin, III: I have a motion to make. I move the Court to set aside the verdict of the jury and enter a verdict for the defendant on the grounds that the Court erred in allowing into evidence the testimony of Trooper Jackson that the defendant was driving the automobile. Because the Trooper testified that he had not advised the defendant of the *Miranda* rights before the statement was made by the defendant. Which is the only evidence that the defendant was driving the automobile. During the time that this statement was made, if it was, at that time the defendant was under arrest and was in custody of the officers. This motion is made on the grounds of the Fifth and Sixth Amendments of the U. S. Constitution as applied to the States by the Fourteenth Amendment as set forth in the *Miranda* case.

* * * *

Thirdly, the Court should have struck the evidence at the end of all the Commonwealth's evidence. The Court should have entered a verdict for the defendant at the conclusion of all the evidence. The Court should not have allowed the granting of any of the instructions and the finding instructions for the prosecution.

* * * *

The Court: The Court is going to overrule your motion."

The Circuit Court of Halifax County, Virginia, entered final judgment on the jury verdict, taking note of the de-

fendant's motions to set aside the verdict and of the defendant's indication that he intended to appeal by a conviction order dated September 13, 1973, portions of which follow:

[R. PP. 24-25][3]

"On September 11, 1973, the defendant was arraigned in this Court on the following charge, to-wit:

"Gene David Clay, WM, P. O. Box 254, Alberta, Virginia, did on the 25 day of April, 1972: Unlawfully and feloniously did operate a motor vehicle upon the public highways of the Commonwealth of Virginia, after having been declared an habitual offender in the violation of Section 46.1—387.8, of the Virginia Code."

Upon his arraignment the defendant pled not guilty

* * * *

Whereupon, the jury retired to consider its verdict and after due consideration the jury returned with the following verdict:

"Commonwealth of Virginia
vs.
Gene Clay, Defendant

We, the jury, find the defendant guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary for a period of *one (1)* years.

s/Doris S. Brookes
Foreman"

* * * *

[3] All of the record to the proceedings in the Circuit Court of Halifax County, Virginia and the Supreme Court of Virginia, except the transcript of the trial on September 11, 1973, are designated by the letter "R" followed by the appropriate page number.

Thereupon, the jury was excused and the defendant moved the Court to set aside the verdict of the jury on the grounds set forth in the transcript of the case, and the Court did overrule said motion.

Wherefore, the Court doth enter order of conviction on the verdict of the jury finding the defendant guilty of the charge set forth in the indictment and doth sentence the defendant to one (1) year in the Virginia State Penitentiary.

It having been suggested by the defendant that the defendant intends to appeal this conviction order, upon the grounds stated in the record, the Court doth suspend execution of the sentence. . . ."

On September 14, 1973, defendant filed a Notice of Appeal and Assignments of Error setting forth Fifth and Sixth Amendments grounds for the appeal. Portions of the Notice of Appeal and Assignments of Error are set forth as follows:

[R. 27-28]

"The defendant, by counsel, hereby gives notice of appeal to the order of the Court of September 13, 1973, entering judgment of conviction on the verdict of the jury. The defendant's assignments of error are as follows:

1. The Court erred in admitting into evidence the testimony of all statements made by the defendant to Trooper C. L. Jackson relative to the occurrence of an accident and how it happened on the day of the alleged offense at a time after defendant had been arrested and in custody of the law officer when the defendant had not been advised of his rights granted by the Fifth and Sixth Amendments to the United States Constitution as applied to the State through the Fifth and Sixth Amendments that anything he said might be held against him, of his right to silence, that he

was entitled to have an attorney with him before making any statement and that if he were unable to pay an attorney, an attorney would be appointed for him, and at a time at which the defendant was unable to intelligently waive these rights.

2. The Court erred in refusing the defense to put on evidence that at the time the defendant made statements used against him in the trial, he was unable to intelligently waive his rights.

* * * *

4. The Court erred in refusing to strike the Commonwealth's evidence at the conclusion of the Commonwealth's evidence for failure of the Commonwealth to prove by competent evidence that the defendant was operating an automobile at the time of the alleged offense.

* * * *

5. The Court erred in refusing to dismiss the case and find a verdict for the defendant at the conclusion of all the evidence for failure of the Commonwealth to prove its case as set forth in the previous assignments.

6. The Court erred in granting any instructions for the Commonwealth because the Commonwealth did not prove that the defendant was driving an automobile at the time in question.

* * * *

7. The Court erred in refusing to set aside the verdict of the jury and enter a verdict in favor of the defendant because the Commonwealth failed to prove that the defendant was operating an automobile at the time of the alleged offense . . ."

On January 10, 1974, defendant filed Petition For Appeal in the Supreme Court of Virginia setting forth the Fifth and Sixth Amendments grounds for the appeal. Portions of the Petition for Appeal are as follows:[4]

"In order to prove its case, the Commonwealth had to offer some evidence that the defendant did in fact drive an automobile as charged. Since none of the Commonwealth's witnesses had seen the defendant anywhere near an automobile (he was arrested in a field away from any vehicle) the only evidence the Commonwealth was able to introduce at the trial was the defendant's own admission in response to police interrogation while in custody.

Therefore, a central issue in the trial, and the only issue on appeal, is whether the statement of the defendant made to the police officers was admissible to the jury. If it was not, then the Commonwealth's case had to fail for lack of any evidence that the defendant had operated an automobile.

* * * *

Even though the defendant's statement was made before he was advised of any of his rights, and in answer to interrogation while in custody, that statement was admitted over objection into evidence in the defendant's felony trial, and formed the only basis for his conviction.

The defendant himself did not testify. The only defense evidence had to do with the mental competence of the defendant at the time of the alleged offense.

* * * *

[4] The Clerk of The Supreme Court of Virginia does not include Petitions for Appeal in records transmitted to this Court but will transmit the Petition for Appeal if requested by the United States Supreme Court.

This appeal asserts that the admission into evidence of the defendant's statement in custody was error and that the conviction should therefore be reversed.

"QUESTION PRESENTED

Whether the statement made by a defendant when he has not been advised of his constitutional rights while in custody for a misdemeanor arrest and in answer to interrogation, can be later used as the sole evidence to prove an essential element of a felony conviction arising out of the same facts as his original arrest? (All assignments of error.)

ARGUMENT

Miranda is directly on point. The defendant was not advised of the rights required by *Miranda*. He made the crucial admission in response to in-custody interrogation, in the absence of proper warnings.

So long as *Miranda* is not overruled, it must be followed, and if it had been followed in the lower court, this confession would have been declared inadmissible in the defendant's felony trial."

On May 7, 1974, The Supreme Court of Virginia denied the Petition for Appeal on the ground that the judgment of the Circuit Court of Halifax County, Virginia, was plainly right, as set forth below:

R. 32

"*VIRGINIA: In The Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 7th day of May, 1974.*

The petition of Gene David Clay for a writ of error and supersedeas to a judgment rendered by the Circuit Court of

Halifax County on the 13th day of September, 1973, in a prosecution by the Commonwealth against the said petitioner for a violation of Section 46.1-387.8 of the Code (Habitual Offender), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:
Howard G. Turner, Clerk

By: /s/ Allen L. Lucy
Deputy Clerk"

APPENDIX B

The following is the final order by the Supreme Court of Virginia upholding the conviction of the petitioner in the Circuit Court of Halifax County, Virginia:

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 7th day of May, 1974.

The petition of Gene David Clay for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Halifax County on the 13th day of September, 1975, in a prosecution by the Commonwealth against the said petitioner for a violation of Section 46.1-387.8 of the Code (Habitual Offender), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Circuit court.

A Copy,

Teste:
Howard G. Turner, Clerk

By: /s/ Allen L. Lucy
Deputy Clerk

APPENDIX C

The following are the applicable State statutes:

(1.) Section 8-476 of the Virginia Code provides as follows:

> *Action on petition; finality thereof.*—The court or judge to whom the petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal or writ of error, and in either case may award a supersedeas to stay proceedings in whole or in part. Upon presentation of such petition, either to the court or any judge, counsel for the petitioner shall be afforded, if he so desires, reasonable opportunity to state orally his reason or reasons why such appeal or writ of error should be granted. The petition shall be rejected when it is from an interlocutory decree or order, if the court or judge to whom it is presented deems it proper that the case should be proceeded in further in the court below before an appeal is allowed therein. If the court shall deem the judgment, decree or order complained of plainly right, and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court at its next term. (Code 1919, Section 6348; 1920, p. 416; 1922, p. 47.)

(2.) Section 18.1-54 of the Virginia Code provides as follows:

> *Driving automobiles, engines, etc., while intoxicated.*—It shall be unlawful for any person to drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, brandy, rum, whisky, gin, wine, beer, lager beer, ale,

porter stout or any other liquid beverage or article containing alcohol or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. (Code 1950, Section 18-75; 1960, c. 358.)

(3.) 18.1-55.1 of the Virginia Code, effective on April 25, 1972, provided as follows:

Use of chemical test to determine alcohol in blood; procedure; qualifications and liability of person withdrawing blood; costs; evidence; suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions.—(a) As used in this section "license" means any operator's, chauffeur's or learner's permit or license authorizing the operation of a motor vehicle upon the highways.

(b) Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after July one, nineteen hundred sixty-four, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, if such person is arrested for a violation of Section 18.1-54 or of a similar ordinance of any county, city or town within two hours of the alleged offense.

(c) If a person after being arrested for a violation of Section 18.1-54 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this State shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, and the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this

State, then refuses to permit the taking of a sample of his blood for such tests, the arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Chief Medical Examiner of Virginia (hereinafter referred to as Chief Medical Examiner), or refuses or fails to so declare in writing and such fact is certified as prescribed in paragraph (j), then no blood sample shall be taken even though he may thereafter request same.

(d) Only a physician, registered professional nurse, graduate laboratory technician or a technician or nurse designated by order of a court of record acting upon the recommendation of a licensed physician, using soap and water to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining the alcoholic content thereof. No civil liability shall attach to any person authorized to withdraw blood as provided herein as a result of the act of withdrawing blood from any person submitting thereto, provided the blood was withdrawn according to recognized medical procedures; and provided further that the foregoing shall not relieve any such person from liability for negligence in the withdrawing of any blood sample.

(d1) Portions of the blood sample so withdrawn shall be placed in each of two vials provided by the Chief Medical Examiner, which vials shall be sealed and labeled by the person taking the sample or at his direction, showing on each the name of the accused, the name of the person taking the blood sample, and the date and time the blood sample was taken. The vials

shall be plaed in two containers provided by the Chief Medical Examiner, which containers shall be sealed so as not to allow tampering with the contents. The arresting or accompanying officer shall take possession of the two containers holding the vials as soon as the vials are placed in such containers and sealed, and shall transport or mail one of the vials forthwith to the Chief Medical Examiner. The officer taking possesion of the container (hereinafter referred to as second container) shall, immediately after taking possession of said second container give to the accused a form provided by the Chief Medical Examiner which shall set forth the procedure to obtain an independent analysis of the blood in the second container, and a list of those laboratories and their addresses, approved by the State Health Commissioner; such form shall contain a space for the accused or his counsel to direct the officer possessing such second container to forward that container to such approved laboratory for analysis, if desired. The officer having the second container, after delivery of the form referred to in the preceding sentence (unless at that time directed by the accused in writing on such form to forward the second container to an approved laboratory of the accused's choice, in which event the officer shall do so) shall deliver said second container to the chief police officer of the county, city or town in which the case will be heard, and the chief police officer who receives the same shall keep it in his possession for a period of seventy-two (72) hours, during which time the accused or his counsel may, in writing, on the form provided hereinabove, direct the chief police officer having possession of the second container to mail it to the laboratory of the accused's choice chosen from the approved list. As used in this section, the term "chief police officer" shall mean the sheriff in any county not having a chief of police, the chief of police of any county having a chief of police, the chief of police of the city or the sergeant or chief of police of the town in which the charge will be heard.

(d2) The testing of the contents of the second container shall be made in the same manner as hereafter set forth concerning the procedure to be followed by the Chief Medical Examiner, and all procedures established herein for transmittal, testing and admission of the result in the trial of the case shall be the same as for the sample sent to the Chief Medical Examiner.

(d3) A fee not to exceed $15.00 shall be allowed the approved laboratory for making the analysis of the second blood sample which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of Section 18.1-54, or of a similar ordinance of any county, city or town, the fee charged shall by the laboratory for testing the blood sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the State treasury.

(d4) If the chief police officer having possession of the second container is not directed as herein provided to mail it within seventy-two (72) hours after receiving said container then said officer shall destroy same.

(e) Upon receipt of the blood sample forwarded to his office for analysis, the Chief Medical Examiner shall cause it to be examined for alcoholic content and he or an Assistant Chief Medical Examiner shall execute a certificate which shall indicate the name of the accused, the date, time and by whom the blood sample was received and examined, a statement that the container seal had not been broken or otherwise tampered with, a statement that the container was one provided by the Chief Medical Examiner and a statement of the alcoholic content of the sample. The certificate attached to the vial from which the blood sample examined was taken shall be returned to the clerk of the court in which the charge will be heard. The certificate attached to the container forwarded on behalf of the accused shall also be returned to the clerk of the

court in which the charge will be heard, and such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner.

(f) When any blood sample taken in accordance with the provisions of this section is forwarded for analysis to the office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the Chief Medical Examiner, or any Assistant Chief Medical Examiner, be admissible in any court, in any criminal proceeding, as evidence of the facts therein stated and of the results of such analysis.

(g) Upon the request of the person whose blood sample was taken for a chemical test to determine the alcoholic content thereof, the results of such test or tests shall be made available to him.

(h) A fee not exceeding ten dollars shall be allowed the person withdrawing a blood sample in accordance with this section, which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of Section 18.1-54 or of a similar ordinance of any county, city or town, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the State treasury.

(i) In any trial for a violation of Section 18.1-54 of the Code or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall,

regardless of the result of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. The failure of an accused to permit a sample of his blood to be withdrawn for a chemical test to determine the alcoholic content thereof is not evidence and shall not be subject to comment at the trial of the case; nor shall the fact that a blood test had been offered the accused be evidence of the or the subject of comment.

(j) The form referred to in paragraph (c) shall contain a brief statement of the law requiring the taking of a blood sample and the penalty for refusal, a declaration of refusal and lines for the signature of the person from whom the blood sample is sought, the date and the signature of a witness to the signing. If such person refuses or fails to execute such declaration, the committing justice, clerk or assistant clerk shall certify such fact, and that the committing justice, clerk or assistant clerk advised the person arrested that such refusal or failure, if found to be unreasonable, constitutes grounds for the revocation of such person's license to drive. The committing or issuing justice, clerk or assistant clerk shall forthwith issue a warrant charging the person refusing to take the test to determine the alcoholic content of his blood, with violation of this section. The warrant shall be executed in the same manner as criminal warrants.

(k) The executed declaration of refusal or the certificate of the committing justice, as the case may be, shall be attached to the warrant and shall be forwarded by the commiting justice, clerk or assistant clerk to the court in which the offense of driving under the influence of intoxicants shall be tried.

(l) When the court receives the declaration of refusal or certificate referred to in paragraph (k) together with the warrant charging the defendant with refusing to submit to having a sample of his blood

taken for the determination of the alcoholic content thereof, the court shall fix a date for the trial of said warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.

(m) The declaration of refusal or certificate under paragraph (k), as the case may be, shall be prima facie evidence that the defendant refused to submit to the taking of a sample of his blood to determine the alcoholic content thereof as provided hereinabove. However, this shall not be deemed to prohibit the defendant from introducing on his behalf evidence on the basis for his refusal to submit to the taking of a sample of his blood to determine the alcoholic content thereof. The court shall determine the reasonableness of such refusal.

(n) If the court shall find the defendant guilty as charged in the warrant, the court shall suspend the defendant's license for a period of 90 days for a first offense and for six months for a second or subsequent offense or refusal within one year of the first or other such refusals; the time shall be computed as follows: the date of the first offense and the date of the second or subsequent offense.

(o) The court shall forward the defendant's license to the Commissioner of the Division of Motor Vehicles of Virginia as in other cases of similar nature for suspension of license unless, however, the defendant shall appeal his conviction in which case the court shall return the license to the defendant upon his appeal being perfected.

(p) The procedure for appeal and trial shall be the same as provided by law for misdemeanors.

(q) No person arrested for a violation of Section 18.1-54 or a similar ordinance of any county, city or town shall be required to execute in favor of any per-

son or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for herein.

(r) The court or the jury trying the case shall determine the innocence or the guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.

(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced.

(t) The governing bodies of the several counties, cities and towns are authorized to adopt ordinances paralleling the provisions of (a) through (s) of this section. (Code 1950 (Suppl.), Sections 18-75.1, 18-75.2; 1954, c. 406; 1956, c. 557; 1956, Ex.Sess., c. 45; 1960, cc. 358, 548, 1962, c. 625; 1964, c. 240; 1966, c. 635; 1970, c. 622.)

(4.) Section 18.1-58 of the Virginia Code provides as follows:

Penalty; subsequent offense; prior conviction.—Any person violating any provision of Section 18.1-54 shall be guilty of a misdemeanor and shall be punished, for a first offense by a fine of not less than two hundred dollars nor more than one thousand dollars or by con-

finement in jail for not less than one month nor more than six months, either or both in the discretion of the jury or the court trying the case without a jury. Any person convicted within any period of ten years of a second or other subsequent offense under Section 18.1-54, or convicted of a first offense under Section 18.1-54 after having been convicted within a period of ten years prior thereto of an offense under former Section 18-75, shall be punishable by a fine of not less than two hundred dollars nor more than one thousand dollars and by confinement in jail for not less than one month nor more than one year. For the purposes of this section a conviction or finding of not innocent in the case of a juvenile under the provisions of Section 18.1-54, former Section 18-75, the ordinance of any county, city or town in this State or the laws of any other state substantially similar to the provisions of Sections 18.1-54 through 18.1-57 of the Code shall be considered a prior conviction. (Code 1950, Section 18-76; 1954, c. 406; 1958, c. 357; 1960, c. 358; 1962, c. 302.)

(5.) Section 46.1-387.8 of the Virginia Code provides as follows:

Operation of motor vehicle by habitual offender prohibited; penalty; enforcement of section.—It shall be unlawful for any person to operate any motor vehicle in this State while the order of the court prohibiting such operation remains in effect, except that such an order shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of land shall not exceed five miles. Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle

in this State while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the penitentiary not less than one nor more than five years and no portion of such sentence shall be suspended, except that in cases of emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended.

For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing such charge shall determine whether such person has been held an habitual offender and by reason of such holding is barred from operating a motor vehicle on the highways of this State. If the court determines the accused has been so held, it shall certify the case to the court of record of its jurisdiction for trial. (1968, c. 476; 1970, c. 507.)

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In The

Supreme Court of the United States

October Term, 1974

No. 74-55

GENE DAVID CLAY,

Petitioner.

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

QUESTIONS PRESENTED

I.

Does Miranda v. Arizona Apply To The General On The Scene Questioning During The Investigation Of Traffic Accidents?

II.

Does Miranda v. Arizona Apply Where A Person Is Charged With A Misdemeanor?

STATEMENT OF THE CASE

The respondent accepts the statement of the case as set forth by petitioner, except that in clarification respondent

would point out that the questions asked the petitioner were asked in the context of investigating the traffic accident (T. 22, 36).

For further clarification it is pointed out that it was not until after petitioner had made the statements in question that it was first learned that petitioner was subject to a felony charge (T. 37).

ARGUMENT AGAINST GRANTING CERTIORARI

I.

Miranda v. Arizona Was Not Applicable To The General On The Scene Questioning During The Investigation Of The Traffic Accident.

This court made it clear in its decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that the decision was "not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U.S. at 477-78.

The thrust of *Miranda* and its forerunner *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), was to prevent law enforcement authorities from placing defendants in an interrogation environment where physical and psychological pressures could be exerted in an effort to elicit incriminating statements. This was made plain where the court in *Escobedo, supra*, said:

> "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the ac-

> cused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." 378 U.S. at 492.

In the present case the questions which were asked by the state trooper, and which are the subject of this petition, were patently of a neutral character and the same as are universally asked at the scene of every motor vehicle accident. The trooper simply asked the defendant who he was and what happened (T. 22, 36). To characterize these questions as being encompassed within the ambit of *Miranda* would be to stretch that decision out of perspective.

The case of *State* v. *Desjardins,* 272 A.2d 599 (N.H. 1970), is factually similar to the case at bar. There the defendant was convicted of driving while under the influence of intoxicating liquor, following an accident. The facts showed that upon approaching the scene of the accident, the investigating officer first saw the defendant standing outside the vehicle on the driver's side and two other persons standing outside on the opposite side of the vehicle. The defendant smelled of alcohol, was bleeding from two lacerations about the eyebrows, appeared drunk, and was arrested by the officer for drunkenness. The defendant was then asked if he was the driver of the vehicle, without being warned of his right to remain silent or his right to have counsel. The defendant, without these warnings, admitted that he was. The officer then arranged to have the defendant transported to the hospital for medical treatment and blood tests while he, the arresting officer, returned to the station to swear out a warrant against the defendant for driving while under the influence. The facts further showed that no evidence beyond the testimony of the arresting officer was introduced to show that defendant was the operator of the vehicle.

In disposing of defendant's argument that the officer's testimony was inadmissible under *Miranda*, the New Hampshire Supreme Court stated:

> ". . . [S]o far as appears the officer's inquiry if he was the driver was part of a 'general on-the-scene questioning' in investigation of the accident of the sort which *Miranda* was not intended to impede. . . . The circumstances disclosed bear none of the hallmarks of inherently coercive police practices calculated to produce an involuntary confession." 272 A.2d at 602.

In conclusion the New Hampshire Supreme Court ruled as follows:

> "Upon consideration of the nature of the offense of which the defendant was charged when questioned, and the fact that the evidence objected to was obtained in the course of a routine on-the-scene investigation of a motor vehicle accident, we are of the opinion that the principles of *Miranda* v. *Arizona* did not require exclusion of the officer's testimony." 272 A.2d at 602.

For similar holdings see *People* v. *Jendrzejak*, 240 N.E. 2d 239 (Ill. App. 1968); *Ford* v. *State*, 226 So.2d 378 (Miss. 1969); *State* v. *Hayes*, 161 S.E.2d 185 (N.C. 1968); *State* v. *Taylor*, 437 P.2d 853 (Ore. 1968). See also the cases compiled in the Annotation in 31 A.L.R.3d 565 (1970).

It is submitted that *Miranda* was not intended to extend to the routine, initial, on-the-scene investigation by police. For it to apply in such circumstances would amount to an unwarranted constitutional straight jacket on law enforcement.

II.

Miranda v. Arizona Does Not Apply Where A Person Is Charged With A Misdemeanor.

At the time defendant made the statements in question he was at most chargeable with driving under the influence (T. 37). This charge is set forth in § 18.1-54, Code of Virginia (1950), and is punishable as a misdemeanor. See § 18.1-58, Code of Virginia (1950). These two code sections are set forth in full in the Appendix to the Petition for Certiorari at pages 25 and 33.

Courts in numerous states have previously held that *Miranda* is not applicable to cases involving misdemeanors. See *State* v. *Angelo*, 203 So.2d 710 (La. 1967); *State* v. *Bliss*, 238 A.2d 848 (Del. 1968); *State* v. *Pyle*, 249 N.E.2d 826 (Ohio 1969), *cert. denied* 396 U.S. 1007; *State* v. *Gabrielson*, 192 N.W.2d 792 (Iowa 1971), *cert. denied* 396 U.S. 920; *State* v. *Neal*, 476 S.W.2d 547 (Mo. 1972). See also the cases compiled in the Annotation in 25 A.L.R.3d 1076 (1969).

The fundamental reason for the *Miranda* rule simply is not present in the investigation of misdemeanors and particularly the investigation of motor vehicle offenses. Nearly all of the interrogation occurs at or near the scene of the violation and not in a coercive atmosphere created by law enforcement officials. The practical effect of a ruling requiring *Miranda* to be complied within misdemeanor cases and particularly traffic offenses, would be to substantially impair, if not destroy, the effectiveness of our system of investigating minor crimes.

CONCLUSION

It is respectfully submitted that *Miranda* was never intended to apply to the general on-scene questioning involved in this case, nor was it intended to be applied in cases involving misdemeanors.

Wherefore, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 21st day of November, 1974, I mailed three copies of the foregoing Brief in Opposition to Henry W. McLaughlin, Jr., Esquire, Court House Square, Halifax, Virginia 24558, counsel of record for petitioner.

JAMES E. KULP
Assistant Attorney General